

No. 5745

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC HUNTING AND FISHING COMPANY,
an Oregon corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Counsel for defendant in their brief contend that the judgment of the lower court should be affirmed because as they say on page 9 of their brief:

“The proof in the present case supports the finding of the trial court that no voyage to Bering Sea was undertaken,”

and, on page 14 of their brief, counsel say:

“The ultimate fact to be established was whether the plaintiff's vessel had undertaken and was engaged in a voyage to Bering Sea when she was boarded by officers from the Thetis.”

This ultimate fact was proven by the uncontradicted and unimpeached testimony offered by plaintiff.

There is no question but that the Bessie Rutter was on a sealing voyage no matter what port in Alaska she cleared for when she left Astoria, Oregon.

The witness Spexarth, who was the managing owner, gave the following testimony:

“Our company built the schooner for sealing. On March 17th she cleared from the Port of Astoria on a fur-sealing expedition bound for Bering Sea. Her Master was Henry Olsen and *I instructed him that he was to go sealing in Bering Sea.*” (Trans. 28.)

On cross-examination he gave the following testimony:

“Q. Were you managing the vessel?

A. I was managing the vessel on shore, but I was not aboard.

Q. Did you issue instructions to the master as to where he was to go and what he was to do?

A. Yes, sir.

Q. Was that part of your shore management?

A. Yes, sir.

Q. What did you instruct the Captain to do?

A. The Captain was instructed to proceed to Bering Sea and had all the things that were necessary to prosecute the voyage.”

Mr. Spexarth gave the same testimony at the trial before Judge Bourquin and this Court in passing on the appeal from Judge Bourquin’s decision, said, referring to the voyage of the Bessie Rutter:

“She cleared from Astoria March 17th, 1891, for a sealing expedition in the Bering Sea; at least such were the instructions of the owner to the master. Thereafter, on June 29th, 1891, and

before she reached Bering Sea the schooner was boarded by Naval officers who delivered to the master a copy of the proclamation together with warning. She did not go into Bering Sea and returned to port in July. There was no contradictory evidence and nothing to impeach Spexarth.”

24 Fed. Rep. 2nd Series, 938.

And in this case there is “nothing to impeach Spexarth”. But defendant’s counsel in their brief claim that Mr. Spexarth’s testimony was contradicted by the Custom records showing that the Bessie Rutter cleared from Astoria, destination Sand Point, Alaska. Said record does not show that it was not the intention of the plaintiff to go to Bering Sea and hunt for seal. It simply shows the first port where the Bessie Rutter on her voyage was to touch. It doesn’t prove the end of the voyage and it doesn’t prove that the voyage was not to embrace the waters of Bering Sea, and doesn’t disprove or contradict in the least the testimony given by Mr. Spexarth, managing owner of the Bessie Rutter that he instructed the master to go to Bering Sea and hunt seal.

Captain Dodge, of the U. S. Coast Guard Service, was called as an expert witness and gave the following testimony:

“Q. What would be the significance of a schooner, sailing schooner, clearing from Astoria for Sand Point, Alaska, the vessel being a registered vessel?

A. That would signify that Sand Point, Alaska, would be her first point of call; she would

touch there first after leaving Astoria; if the vessel was going to proceed from there she would clear from there for another port wherever she chose to go and obtain clearance papers there."

Then the Court interrogated the witness as follows:

The COURT. In other words, it is put under a legal obligation to go to the port to which it has cleared? A. To which it has cleared.

Q. Having accomplished that it is under no obligation to go to any particular place?

A. No; after that when she arrives at that port the law compels her to enter the vessel there, and if he does not report to the Collector of Customs her arrival there inside of 24 hours she is subject to a fine; if he is trading he may obtain cargo there for the next port. Or he may go to another cargo port. Or *he may go whaling or hunting.*

Q. Is there any other significance than that Sand Point was their first point of touching?

A. Only that she cleared for that point and he would be under the duty of going to that port and presenting her clearance or ship papers."

(Transcript 46-47).

If, after the Bessie Rutter presented her clearance papers at Sand Point she could lawfully go hunting anywhere in Bering Sea how can the Court, from that fact, draw the inference that the owners of the Bessie Rutter never intended a sealing voyage into Bering Sea when she cleared from Astoria. Being especially built for sealing and fishing purposes and being fully equipped for hunting seal and not fit for any other business is it not unreasonable to suppose that she would sail for Sand Point and after arriving there

turn around and come home without going to the well-known hunting grounds in Bering Sea?

Captain Dodge was shown the clearance papers of the Bessie Rutter and was asked the following question:

“Q. But this (showing plaintiff’s Exhibit, the clearance for Sand Point) would be a perfectly proper paper for a vessel that was intending to hunt seal in the Bering Sea? A. Yes, sir.”

If this was a “proper paper for a vessel that was intending to hunt seal in the Bering Sea” how can the Court draw an inference therefrom that the owners of the Bessie Rutter never intended a sealing voyage to Bering Sea when the managing owner testified that the voyage was for Bering Sea and that he instructed the Master of the Bessie Rutter to go to Bering Sea and hunt for seal. If there was no evidence in the case other than the clearance papers, then the Court could readily find that the vessel’s destination was for Sand Point only, but when the promoters of the voyage testify that the vessel was sent to Bering Sea to hunt seal, and when Government maps offered in evidence show that it was engaged in sealing and following the seal herd and warned from going into Bering Sea by the Government we submit that the only fair, just and reasonable deduction that can be made is that the Bessie Rutter was on a sealing voyage to Bering Sea and was prevented from going there by defendant’s gunboats and this presumption cannot be overcome by an inference drawn from its clearance papers espe-

cially when they permit a voyage to Bering Sea.

Sec. 4358 of the U. S. Revised Statutes is as follows:

“The Coasting trade between the territory ceded to the United States by the Emperor of Russia and any other portion of the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great Districts.”

In 1891 and prior thereto and until 1892 the United States claimed exclusive jurisdiction over all that portion of the Bering Sea inclosed within the boundaries of Alaska as ceded by Russia of which the Court will take judicial notice.

The Bessie Rutter in clearing from Astoria, Oregon, to Sand Point, Alaska, was proceeding from one great Customs District to another and under Article 203 of the Treasury Department regulations, Document No. 552, adopted July 1st, 1884, was obliged to have a manifest.

Having reached Sand Point the Bessie Rutter under the law and rules and regulations of the Treasury Department had the right, without clearing from Sand Point, to hunt anywhere in the Alaskan waters including Bering Sea these waters being in the Alaskan Great District.

“A vessel of 20 tons burden or upwards licensed for the coasting trade, bound from one collection district to another within the same great coasting district * * * in ballast, or having on board goods, stores or merchandise, etc., * * * may proceed from one place to another within the limits afore-

said without delivering a manifest thereof, or obtaining from any officer of the customs a permit to depart.”

The same rule applied to registered vessels such as the *Bessie Rutter* under Section 4261, Revised Statutes.

This rule was also laid down by the Treasury Department in its decision No. 4498 of April 19, 1880, addressed to the Collector of Customs, Georgetown, D. C., and reading in part as follows:

“In a communication to the Department of the 8th instant you inquired whether under the Regulations of the Circular of the Department of June 27, 1879, American vessels under register and engaged in the coasting trade, may enter from one port to another without entering or clearing. You are informed that by the circular in question registered vessels engaged in the coasting trade are divided into two classes: First, such as are laden with excesses of the commodities specified in Sections 4349, 4351 and 4359 Revised Statutes. Such registered vessels will enter and clear in every marine customs district.

“Second: Such as are either in ballast, or not laden with excesses of those commodities (vide *Bessie Rutter*) are obliged to enter and clear *only* when making a trip *other* than from a marine district in one State to a similar district in the same or an adjoining State.”

Articles 208 of the same Regulations reads in part as follows:

“The master of every vessel of the burden of 20 tons or upwards licensed for the coasting trade,

bound from one to another great coasting district * * * * must, previously to its departure deliver to the Collector residing at the port * * * * duplicate manifests of the cargo on board such vessel, to which he must make oath or affirmation according to Form 58, R. S. 4353. If there be no cargo or lading other than sea stores on board such vessel, the master or commander must make oath or affirmation that such is the case. The collector * * * * will then certify the manifests, and grant a permit as in the preceding case.”

Article 179 of the present customs regulations, edition of 1923, Treasury Department Document No. 2924, reads in part as follows (Italics ours):

“Vessels duly licensed as vessels of the United States and entitled to engage in the coasting trade, may proceed from port to port, or from place to place within the same great district, however laden, or in ballast, *without reporting their departure or arrival at the custom house*, unless carrying bonded merchandise in which event they shall enter and clear. All vessels engaged in the coasting trade proceeding between ports in *different great coasting districts must enter and clear.*”

It thus becomes apparent that when the Bessie Rutter cleared for Sand Point, Alaska, and duly entered at that customs station, it was entitled to carry on its trade anywhere within that great customs district, which the Government contended at that time included all the waters of Bering Sea, without further clearance or permit, and to hold that the Court is entitled to draw the deduction from the marine documents that Sand Point was an ultimate destination,

is an inference entirely unsupported by law and by the evidence.

II.

After the conclusion of the trial, and after counsel for defendant raised the point that the Bessie Rutter, as shown by its clearance papers only intended a voyage to Sand Point and not to Bering Sea, plaintiff asked permission to take further testimony on that point, it being the first time it was raised, which was granted and a stipulation was entered into to take the depositions of Mr. Spexarth and Sam Freeman, who were both owners of the Bessie Rutter and interested in its voyage. On November 16th, 1928, their depositions were taken in Portland, Oregon. In his deposition Mr. Spexarth gave the following testimony:

“Q. Now you say the schooner was bound for Bering Sea? A. Yes.

Q. Where did she clear for? A. Sand Point.

Q. Sand Point, where?

A. Sand Point, Alaska.

Q. Why did she clear for Sand Point, Alaska?

A. Well, she cleared for Sand Point, Alaska, because those were instructions from the Astoria Custom officers that she had to clear for Sand Point or for some point other than in this Custom's district and in accordance with the instructions I cleared her for Sand Point. (Page 4 of Deposition).

Q. Do you have any recollection of the fact of making the clearance? A. Yes.

Q. What is that?

A. Well, chiefly the instructions of Mr. Parker, the collector or chief deputy that this had to be complied with. When the vessel leaves one

great custom district it had to enter into some other.

Q. Now did the Bessie Rutter have any cargo for Sand Point? A. No; no cargo of any kind.

Q. What did she carry?

A. She carried nothing but her stores, arms, and ammunition and a net; the fish net to be used in Bering Sea catching seals with a net."

(Page 5 of Deposition).

On cross-examination Mr. Spexarth gave the following testimony:

"Q. Mr. Spexarth, you said that when the vessel cleared, you had some talk with the custom officer at Astoria about clearing her, and that he said in going from one customs district to another you should clear for some particular point?

A. Yes that was the requirement.

Q. Did you have any discussion with him about whether or not Bering Sea would be open to seal hunters at that season?

A. No, I don't think that we did; no not in particular.

Q. You say, 'Not in particular'; just what was said.

A. Well the conversation was that he was going sealing and the destination was to Bering Sea, and then Mr. Parker said: 'You have got to enter at some custom house, because when you go to Alaska you are leaving this great custom district,' and that made him clear for Sand Point."

(Page 16-17 of Deposition).

This fully explains how the Bessie Rutter happened to clear for Sand Point.

Sam Freeman in his deposition gave the following testimony:

“Q. What connections if any did you have with the schooner Bessie Rutter.

A. I had an interest in her.

Q. Do you know who built her?

A. The builder was John Rutter.

Q. But the parties who built her?

A. Henry Olson, Theodore Bracker, Mr. Spexarth and myself.

Q. Did you afterwards have stock in the Pacific Hunting and Fishing Company, a corporation? A. Yes sir I did.

Q. Did the company own the Bessie Rutter after she was built? A. Yes.

Q. Now do you remember why you built the Bessie Rutter? A. For sealing at Bering Sea.

Q. Do you know when she left Astoria?

A. I am not sure, it was so long ago.

Q. We will put it this way: When she left Astoria in 1890 or 1891, do you know where she was bound for? A. Bering Sea.

Q. What for? A. Sealing.”

The testimony of Mr. Spexarth shows the reason why the Bessie Rutter was cleared for Sand Point. The Custom officer said it had to clear for that place and following his advice and instructions the vessel was so cleared.

The Court denied plaintiff's motion to open the case to receive this evidence and ordered that findings be entered in defendant's favor to which plaintiff duly excepted.

Among the assignment of errors printed in the Record we quote the following:

“VIII

The Court erred in rejecting plaintiff's petition for a rehearing and resubmission of the case,

and in not exercising a sound judicial discretion by permitting a reopening of the case for the introduction of further testimony which had already been taken by deposition on stipulation in order to avoid a miscarriage of justice.”

“IX

The Court erred in denying plaintiff’s motion to withdraw, vacate and set aside its opinion rendered in defendant’s favor on October 29th, 1928, and in place thereof to give judgment to plaintiff upon the ground that the uncontradicted evidence in the case established plaintiff’s right to a judgment in its favor to which ruling plaintiff duly excepted and which exception was allowed by the Court.”

After these motions were made and denied findings were made by the Court and a judgment was ordered to be entered in defendant’s favor.

The depositions of Mr. Spexarth and Mr. Freeman taken in November, 1928, were submitted to the Court by plaintiff in its proposed bill of exceptions, and were not allowed by the Court and ordered to be stricken therefrom. We will ask to have the Clerk of the District Court send these depositions to the Clerk of this Court and respectfully ask that in passing upon this appeal they may be considered and treated as a part of the record on appeal.

The testimony therein contained clearly shows that the managing owner of the Bessie Rutter wanted to clear the Bessie Rutter for a hunting voyage to Bering Sea and was prevented from doing so by the Collector of Customs who informed him that he must clear

for Sand Point, the Custom House in that great district. As we have shown such clearance was correct for a voyage to Bering Sea and to permit a matter of this kind to defeat plaintiff's cause of action for damages suffered by the action of the defendant in interfering with the voyage of the Bessie Rutter would be a miscarriage of justice and for that reason the decision of the Court should be reversed and plaintiff given an opportunity to offer said depositions in evidence.

III

We have asked in our opening brief that in reversing the decision of the lower court that it be directed to enter a judgment in favor of plaintiff in the sum of \$16,870.50.

Counsel in their reply brief object to this and say:

“Appellant has overlooked the testimony of their own witnesses that the crew of the Bessie Rutter, was an a salary basis, as well as a lay. Plainly if the crew would hve been paid a flat wage in addition to the lay, for each month of the voyage, as the witness Spexarth testified, (Rec. p. 33) there is no good reason for failing to allow a deduction of this amount from the judgment.”

Counsel must have overlooked the decision of the case of the United States v. Laffin, reported in Vol. 24 Fed. Rep. 2nd Series, 683, also in United States v. Peterson, 28 (2nd) Fed. 29. In cases of this kind it is the duty of the owners of the vessels to bring

an action for damages and may recover for the full amount, but when recovered they hold the same in trust for the payment of the wages and lays of the officers and members of the crew which they would have earned had the voyage been completed. This point has been raised in a number of the so-called sealing cases and in each one it has been decided that the owners of the vessel may maintain in their own name, without joining with them members of the crew, and recover full damages.

From any judgment which plaintiff may recover in this action it must pay to the officers and members of the crew of the *Bessie Rutter* or their legal representatives the wages they would have received had the voyage not been interfered with. The lay which they were to receive is treated as wages only, as decided by the *Lafin* and *Peterson* cases and the many decisions referred to in the opinion of the Court.

In conclusion, we respectfully submit that the plaintiff is entitled under the Act of June 7th, 1924, to recover a judgment against defendant for damages suffered because of its interference with the sealing voyage of the *Bessie Rutter*.

The uncontradicted evidence shows that the *Bessie Rutter* was built to be used for hunting and fishing and was suitable for no other purpose; that on the 17th day of March, 1891, it cleared from Astoria, Oregon, for a sealing voyage to Bering Sea where the seal herd were alone to be found from the 1st of July to the middle of September, and while on its voyage on the 29th day of June, 1891, she was boarded by an

officer from the U. S. S. Thetis who served a warning on the master of the Bessie Rutter not to enter Bering Sea to hunt for seal, and the master of the Bessie Rutter complied therewith and returned to Astoria, the home port. It is also conclusively shown by the testimony of Captain Fredrick Dodge of the United States Coast guard survey that the clearance papers of the Bessie Rutter were proper papers for a sealing voyage into Bering Sea, which fact is also shown by Statutes of the United States, and Government regulations hereinbefore referred to, and this being true, and no evidence having been offered to contradict it, the Court should have found that the voyage of the Bessie Rutter was intended for sealing in the Bering Sea, and there was nothing in the evidence to justify or warrant its findings that said vessel did not intend to hunt there.

As discussed in our opening brief, after the interference the vessel cleared for Japan, but afterwards gave up the voyage and returned home, no doubt because the master learned that there was no place where seal could be successfully hunted after the first of July outside of the Bering Sea.

But for this interference there can be no doubt or question but that its master would have followed the instructions given to him to go to Bering Sea where he would have been certain to make a successful catch.

Respectfully submitted,

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